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claims filed, answers to at least some of the remaining questions should be forthcoming.

Albert M. Hand, Jr.

CONTINUING JURISDICTION FOR CHILD CUSTODY

Defendant was granted a divorce in Louisiana and was awarded the permanent care and custody of his and plaintiff's minor children. Defendant later moved to Texas and took the two minor children with him, whereupon plaintiff filed a rule for contempt and a change of custody. The district court refused to grant the rule, because it believed that it lacked jurisdiction to modify the previous decree. The Fourth Circuit Court of Appeal issued a writ of mandamus and ordered the lower court to hear the matter. The Louisiana Supreme Court *held* that, absent some compelling reason for exercising continuing jurisdiction, the Louisiana court has no jurisdiction to determine custody matters if the children were neither domiciled nor physically present in the state. *Odom v. Odom*, 345 So. 2d 1154 (La. 1977).

As society has become increasingly mobile, the problem of determining which courts may properly exercise jurisdiction to determine custody matters concerning children who have moved out of the state¹ has become more complex. In *Samsell v. Superior Court*,² the California Supreme Court enumerated the three basic theories which have been used by various states³ to exercise jurisdiction in custody matters: the child's domicile in the state; or his physical presence in the state; or, if neither of these factors is present, the parents' amenability to the jurisdiction of the state court. Once such jurisdiction has attached, the problem arises whether it continues once the child has left the state. Some states have

1. See generally Bodenheimer, *The Uniform Child Custody Jurisdiction Act: A Legislative Remedy for Children Caught in the Conflict of Laws*, 22 VAND. L. REV. 1207 (1969); Hudak, *The Plight of the Interstate Child in the American Courts*, 9 AKRON L. REV. 257 (1975).

2. 32 Cal. 2d 763, 197 P.2d 739 (Cal. 1948).

3. *Id.* at 777, 197 P.2d at 748. This is the test adopted by the Restatement (Second) of Conflict of Laws section 79.

refused to exercise continuing jurisdiction when both the child and his custodian have left the state and thus the court's jurisdiction.⁴ However, the majority of courts have held that once a court has acquired jurisdiction, it shall continue even though the child and his custodian have left the state.⁵

The question of continuing jurisdiction in such cases is further complicated by the United States Supreme Court's refusal to declare the weight that a state must give to original custody decrees and modifications rendered by a different state. In *New York ex. rel. Halvey v. Halvey*,⁶ where full faith and credit was sought for a Florida decree in New York, the Supreme Court held that the judgments of the Florida court could not claim a more conclusive effect in New York⁷ than in Florida, whose law provided that new facts could justify a reversal of the earlier custody award.⁸ The Court concluded that clearly the forum state had at least as much leeway to disregard the judgment, to qualify it, or to depart from it as the state where it was first rendered.⁹ The Supreme Court has consistently refused to clarify its position beyond the holding in *Halvey*, and has chosen to decide subsequent cases on narrower issues.¹⁰

Louisiana jurisdiction in custody matters is governed by article 10 of the Code of Civil Procedure, which grants courts jurisdiction to determine the custody of a minor domiciled or physically present in the state. The First and Second Circuit Courts of Appeal have held that Louisiana courts lack jurisdiction to modify their original decrees if the child is neither domiciled nor physically present in the state at the time modification is

4. *Milner v. Gatlin*, 139 Ga. 109, 76 S.E. 860 (1912); *Hines v. Hines*, 220 Tenn. 437, 418 S.W.2d 253 (1965).

5. See, e.g., *Koelsch v. Rone*, 3 Ill. 2d 483, 121 N.E.2d 738 (1954); *Bull v. Wilson*, 362 S.W.2d 662 (Tex. 1962); *Sheffield v. Sheffield*, 207 Va. 288, 148 S.E.2d 771 (1966); *Anderson v. Anderson*, 8 Wis. 2d 133, 98 N.W.2d 434 (1959).

6. 330 U.S. 610 (1947).

7. *Id.* at 614.

8. *Id.*

9. *Id.* at 615.

10. In *May v. Anderson*, 345 U.S. 528 (1953), the Court decided that it need not consider the question of what full faith and credit a custody decree should be entitled to inasmuch as the trial court had lacked personal jurisdiction over one of the litigants. In *Kovacs v. Brewer*, 356 U.S. 604 (1958), the Court remanded the case to the North Carolina Supreme Court for clarification of its holding, since it was unclear whether changed circumstances was an alternative basis for its decision to ignore a sister state's decree. In *Ford v. Ford*, 371 U.S. 187 (1962), the Court held that Virginia's dismissal of the case was not to be treated as *res judicata*, which precluded determining the question of full faith and credit.

sought.¹¹ In *Nowlin v. McGee*,¹² the Second Circuit examined decisions in which Louisiana courts had been faced with a similar situation in reverse,¹³ and ruled that these decisions established the Louisiana conflict of laws rule for jurisdiction over a minor to modify a custody order.¹⁴

In both the prior decisions cited in *Nowlin*, the Louisiana courts had reasoned that *Halvey* precluded them from granting full faith and credit to the foreign decrees. In one of the cases, the supreme court denied full faith and credit to a modified custody decree obtained while the wife and children were domiciled and residing in Louisiana since the foreign court had lacked jurisdiction over the parties.¹⁵ Citing *Halvey*, the court held that this jurisdictional defect could not be cured by the full faith and credit clause.¹⁶ The First and Second Circuits interpreted the Supreme Court's position in *Halvey* to preclude foreign courts from exercising continuing jurisdiction, and thus reasoned that Louisiana courts were prevented from doing the same when the situation was reversed.¹⁷

The Third and Fourth Circuits have relied on a different line of Louisiana jurisprudence, and have concluded that the Louisiana courts could exercise continuing jurisdiction when the child was no longer domiciled or present in the state, if modification of an original decree was sought in the court which issued that decree.¹⁸ In *Bates v. Bates*,¹⁹ the Fourth Circuit accepted the wife's position that jurisdiction was conferred on the Louisiana court by the husband's acquiescence in filing a rule for custody while the child resided in the state.²⁰ The court further found that once jurisdiction had attached, the child's removal from the state could not

11. *Stewart v. Stewart*, 233 So. 2d 305 (La. App. 1st Cir. 1970); *Nowlin v. McGee*, 180 So. 2d 72 (La. App. 2d Cir. 1965).

12. 180 So. 2d 72 (La. App. 2d Cir. 1965).

13. In *Huhn v. Huhn*, 224 La. 591, 70 So. 2d 391 (1954), the Louisiana Supreme Court refused to enforce a Tennessee custody order which it held was not entitled to full faith and credit. *In re Ackenhausen*, 146 So. 2d 37 (La. App. 4th Cir. 1962), held that a modified divorce decree of the Nevada court was not entitled to full faith and credit in Louisiana since the foreign court had no jurisdiction inasmuch as the children and custodial parent were domiciled in Louisiana at the time.

14. *Nowlin v. McGee*, 180 So. 2d 72, 74 (La. App. 2d Cir. 1965).

15. *In re Ackenhausen*, 146 So. 2d 37, 39 (La. App. 4th Cir. 1962).

16. *Id.*

17. *Stewart v. Stewart*, 233 So. 2d 305 (La. App. 1st Cir. 1970); *Nowlin v. McGee*, 180 So. 2d 72 (La. App. 2d Cir. 1965).

18. *Bates v. Bates*, 331 So. 2d 122 (La. App. 4th Cir. 1976); *Lynn v. Lynn*, 316 So. 2d 445 (La. App. 3d Cir. 1975); *Pattison v. Pattison*, 208 So. 2d 395 (La. App. 4th Cir. 1968).

19. 331 So. 2d 122 (La. App. 4th Cir. 1976).

20. *Id.* at 123.

defeat it.²¹ This view rested on the belief that a court, having once acquired jurisdiction over the principal demand, retains it for incidental matters such as alimony and custody²² even though the child has left the state.²³ In *Pullen v. Pullen*,²⁴ the Louisiana Supreme Court found that a judgment for custody was revocable by its very nature, and that the court which rendered the judgment had jurisdiction to execute or modify it.²⁵ These decisions provided the rationale which led the Third and Fourth Circuits to find that there is continuing jurisdiction in both matters of custody and alimony.

In *Imperial v. Hardy*,²⁶ the supreme court held that a court could exercise continuing jurisdiction in matters of child support. The court found that jurisdiction over the child's status alone could not justify continuing jurisdiction to increase the child support, and stated that personal jurisdiction over the father was required to support such a judgment. However, the court found that the husband had submitted to the jurisdiction of the Louisiana courts and reasoned that it would be meaningless for a party to submit to a court's jurisdiction and be cast for child support if the court could not subsequently modify or enforce its judgment.²⁷

In the instant case, the supreme court was presented with facts which were quite similar to those in *Nowlin*, and which raised the question whether a Louisiana court could modify its original custody decree if the child was no longer in the state. The court pointed out the inapplicability of article 10 since the minors were both physically present and domiciled in Texas.²⁸ Since there were no independent grounds for jurisdiction the court held that there was no continuing jurisdiction in the instant case. The court distinguished *Odom* from *Imperial v. Hardy* by noting that the state's legitimate interest in protecting its residents supported the exercise of continuing jurisdiction in the case of alimony or child support.²⁹ By applying this rationale to the instant case, the court reasoned that Louisiana's interest was remote in spite of the presence of the non-

21. *Id.*

22. *Wheeler v. Wheeler*, 184 La. 689, 167 So. 191 (1936).

23. *Blackburn v. Blackburn*, 168 So. 2d 898 (La. App. 2d Cir. 1964).

24. 161 La. 721, 109 So. 400 (1926).

25. *Id.* at 725, 109 So. at 402.

26. 302 So. 2d 5 (La. 1974).

27. *Id.* at 8.

28. The court cites Louisiana Civil Code article 39 which states that the domicile of an unemancipated minor is with his father, mother or tutor to indicate that the domicile of a minor is that of the parent to whom custody is granted. 345 So. 2d at 1154.

29. 345 So. 2d at 1155.

custodial parent in Louisiana. The court chose instead to leave the matter to the Texas courts since the state of the child's domicile had a more immediate interest in regulating the conditions affecting that child, as well as the ability to enforce such regulations.³⁰ The majority further found that no compelling reasons justified an attempt by the Louisiana courts to exercise continuing jurisdiction³¹ and distinguished the cases cited for the proposition of continuing jurisdiction.³² The supreme court construed article 10 as a grant of jurisdiction only in cases where the child was either domiciled or physically present in Louisiana, and declared that the intent of the article prevented the state from exercising continuing jurisdiction unless compelling reasons were shown. The court concluded that "absent a showing of some compelling reason for the Louisiana court to attempt to exercise continuing jurisdiction, the district court was without jurisdiction."³³ The court thus reached the conclusion that the district court *lacked* jurisdiction in the instant case, but drew this conclusion from reasoning which would indicate rather that the court should not *exercise* jurisdiction. In distinguishing *Odom* from *Imperial*, the supreme court found that Louisiana's interest in the instant case differed in that here, Louisiana's was minimal and that Texas had a more immediate and direct interest in the welfare of the minors involved.³⁴ Although such considerations may well determine whether a court should exercise its jurisdiction, they do nothing to indicate whether the court actually has the power or authority to hear the case. The supreme court leaves unanswered the question whether the exercise of continuing jurisdiction in this instance would violate due process, yet this is an essential issue in determining if a court has jurisdiction. Because of the inconsistencies in the majority's opinion it is unclear whether they are determining that the district court has no jurisdiction over the matter or whether the district court merely may not exercise its jurisdiction.

Thus the court declared that in some custody cases, there is continu-

30. *Id.*

31. *Id.*

32. In *Wilmot v. Wilmot*, 223 La. 221, 65 So. 2d 321 (1953), although the court stated that jurisdiction would be retained if the children left the state, this was not the issue. In distinguishing *Wheeler v. Wheeler*, 184 La. 689, 167 So. 191 (1936), the court found that case was properly decided since the child was present in the state. *Lukianoff v. Lukianoff*, 166 La. 219, 116 So. 890 (1928), stands only for the proposition that the Louisiana court which granted the separation has jurisdiction to grant a divorce later, even though both parties have left the state. *Pullen v. Pullen*, 161 La. 721, 109 So. 400 (1926), dealt with continuing venue.

33. 345 So. 2d at 1156.

34. *Id.* at 1155.

ing jurisdiction while in others there is none, which led Justice Sanders to criticize the majority opinion as unsound in legal theory.³⁵ The majority could have avoided this confusion by determining whether jurisdiction does continue in custody proceedings once the basis for jurisdiction for the original decree is gone: that is, whether it is constitutionally permissible³⁶ and if so, whether Louisiana has authorized such jurisdiction. Only after determining whether the Louisiana district court had the power to hear the matter should the court have ruled on the wisdom of exercising continuing jurisdiction if the child is no longer present or domiciled in the state.

The holding of *Odom* produces some practical problems as well by establishing a general rule of no continuing jurisdiction in custody matters involving absent minors without compelling reasons. Although this decision has ended the confusion created by the conflicting positions taken by the circuit courts, it leaves unanswered the question of what are "compelling reasons." The court offered no indication of which reasons it will consider compelling, and there is little jurisprudence to show what the court meant.³⁷ As Justice Sanders pointed out in his dissent, the court's holding strips Louisiana residents of "a convenient forum to modify the only existing custody decree so as to adjust visitation and custody rights."³⁸ Since the position taken by the court is contrary to the majority rule that a court entering an original decree may exercise continuing jurisdiction and modify it,³⁹ Louisiana residents are denied a forum available to residents of other states for relitigating custody issues. Furthermore, by limiting jurisdiction in child custody cases to the requirements of article 10, the court may well have created more problems. Civil Code article 39 makes it clear that the domicile of a minor child is with the custodial parent. Thus if the non-custodial parent is the only parent domiciled in the state, he must meet the second requirement of article 10

35. *Id.* at 1156.

36. Although there is no definitive ruling as to the constitutionality of continuing jurisdiction, the majority of states accept the principle of continuing jurisdiction in child custody and alimony matters. See cases cited in note 5, *supra*. *Corkill v. Cloninger*, 153 Mont. 142, 454 P.2d 911 (1969), offers some insight into the constitutionality of continuing jurisdiction in child custody cases. Further, a number of courts have urged discretion in the exercise of continuing jurisdiction when this creates an inconvenient forum. *Feigen v. Walker*, 51 Misc. 2d 755, 273 N.Y.S.2d 944 (1966).

37. *In re Dunkley*, 15 Wash. App. 775, 551 P.2d 1394 (1976), is one of the few cases which may provide guidance on this point. There compelling circumstances were found because the children had run away from their mother in California, because of her misconduct toward their father.

38. 345 So. 2d at 1157.

39. See cases cited in note 5, *supra*.

which requires that the child be present in the state. The Louisiana Supreme Court has made clear that under the doctrine of *parens patriae* Louisiana courts have not only the right but the duty to provide for the best interest of a child found in the state even if the child is technically domiciled elsewhere.⁴⁰ In cases before *Odom* appellate courts had followed this rationale to allow jurisdiction to be exercised under article 10(5) regardless of circumstances and even if the child was in Louisiana against the wishes of his custodial parent.⁴¹ The Fourth Circuit in *Smith v. Ford*⁴² sought to limit the application of the "in state" requirements by refusing to exercise "emergency" jurisdiction when the child's domicile was elsewhere and the mother had brought him to Louisiana without the custodial parent's permission. However, the Fourth Circuit in *Rafferty v. Rafferty*⁴³ expressly rejected the *Smith* rationale on the ground that no such restriction could be found in article 10(5).⁴⁴ Thus the Louisiana courts have not refused to exercise jurisdiction in "child snatching" cases. This could well create problems far worse than Justice Sanders' fear that Louisiana residents will be forced to chase the custodial parent from state to state. The limitation of forums placed on Louisiana residents by a strict construction of article 10 may encourage self-help measures such as "child snatching"—a problem which is troublesome enough without encouragement.

Jan Marie Hayden

THE HUMAN CANNONBALL AND THE PRESS

The plaintiff, the performer of a "human cannonball" act, sued a Cleveland television station for having broadcast his entire act on the evening newscast.¹ The Supreme Court of Ohio acknowledged the plain-

40. *Girtman v. Ricketson*, 221 La. 691, 60 So. 2d 88 (1952).

41. *Rafferty v. Rafferty*, 313 So. 2d 356 (La. App. 4th Cir. 1975); *Lucas v. Lucas*, 195 So. 2d 771 (La. App. 3d Cir. 1966).

42. 288 So. 2d 71 (La. App. 4th Cir. 1974).

43. 313 So. 2d 356 (La. App. 4th Cir. 1975).

44. *Id.*

1. The script of the commentary read: "This . . . now . . . is the story of a true spectator sport . . . the sport of human cannonballing . . . in fact, the great